IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LERISSA FALE IATA, Appellant.	No. 36950-8-II consolidated with
STATE OF WASHINGTON, Respondent, v. FARAJI ONTIA BLAKENEY, Appellant.	No. 37018-2-II UNPUBLISHED OPINION

Houghton, P.J. — In these consolidated cases, Faraji Blakeney and Lerissa Iata appeal their convictions of unlawful manufacture of a controlled substance, cocaine (counts I and VII), and unlawful possession of a controlled substance, cocaine, with intent to deliver (counts II and VIII). Blakeney also appeals his convictions of first degree unlawful possession of a firearm (count III), second degree possession of stolen property (count V), and second degree identity theft (count VI).[1] We affirm.

[1] The trial court dismissed count IV.

Blakeney argues that insufficient evidence supports his convictions, the State offered an untimely accomplice liability jury instruction, and the untimely offering of the instruction constituted prosecutorial misconduct. Pro se, he argues that insufficient evidence supported his firearm and school bus route stop sentence enhancements.

Iata argues that the accomplice liability statute is unconstitutionally overbroad under the First Amendment and it relieved the State of its burden to prove an overt act. She further argues that the knowledge instruction created a mandatory presumption and that the untimely presentation of the accomplice liability instruction prejudiced her defense. Pro se, she argues that insufficient evidence supported the firearm enhancement and school bus zone enhancement, the warrant lacked probable cause, and the prosecutor denied her due process rights by not timely disclosing newly discovered evidence. We affirm.

FACTS

During the morning of September 8, 2006, eight Pierce County sheriff's deputies with a search warrant entered a residence at 2540 62nd Avenue East in Fife. Inside, police discovered Blakeney in one of two bedrooms along with three minors and Iata in the living area.[2]

In the kitchen, police found three boxes of baking soda, three microwaves, a measuring cup, glassware, utensils, and razor blades. There was cocaine residue on all the items. They also found a police radio scanner and marijuana.

In a bedroom, in a shoe box police found materials for measuring narcotics, various

[2] Additionally, deputies arrested a teenage male near the entrance and an adult male and female couple in the second bedroom. Neither the adults in the second bedroom nor the three minors found in the first bedroom are defendants in this case.

amounts of cash totaling $659; in a second shoe box, they found $6,250, marijuana, and a tin with cocaine residue. In the closet, they also found a leather shoulder holster, measuring cup, razor, letter opener, and other materials with cocaine residue. Under a pile of clothes, they found a loaded Colt .357 revolver and ammunition.

In the second bedroom's closet, police found a blue denim purse with rocks of cocaine, a loaded Smith and Wesson .38 revolver, a broken scale, $130, and Iata's identification. In the closet, they also found documents, including a bank statement for a joint account held by Iata and Blakeney that listed 2540 62nd Avenue East as their address.[3] Finally, police found Stacy Loepp's military identification, Washington identification, Macy's credit card, and Social Security card. Loepp testified at trial that someone had stolen the items from her in January 2006.

At trial, the State called a Fife School District agent. He testified that there was a school bus route stop 266 feet from the apartment.

During the State's closing argument, both defense counsel objected to the State arguing an accomplice liability theory without presenting an accomplice liability instruction to the jury. The trial court denied Blakeney and Iata's motion for a mistrial and supplemented the jury instructions to include accomplice liability. After the supplementation, the State completed its closing argument.

The jury convicted both Blakeney and Iata on all counts. The trial court sentenced Blakeney to 240 months' and Iata to 147 months' confinement, including firearm and school bus route stop enhancements.[4] They appeal.

[3] One of the documents with Blakeney's name on it listed a different address in Tacoma.

ANALYSIS

Sufficiency of the Evidence

Blakeney first contends that insufficient evidence supported his convictions because the State did not establish that he exercised dominion and control over the apartment, the bedroom, or the closet. He concedes that sufficient evidence existed to prove the manufacture of controlled substances in the apartment. Therefore, all of his arguments with respect to sufficiency of the evidence relate to whether he constructively possessed the drugs, paraphernalia, firearm, and stolen property.

To prevail on his sufficiency of the evidence challenge, Blakeney must show that any rational fact finder could have found the elements of a crime beyond a reasonable doubt. *State v. Allen*, 159 Wn.2d 1, 7, 147 P.3d 581 (2006). We review the evidence in the light most favorable to the State and weigh all reasonable inferences from the evidence in its favor and most strongly against the defendant. *State v. Gregory*, 158 Wn.2d 759, 817, 147 P.3d 1201 (2006).

Because Blakeley concedes that sufficient evidence supported a finding of manufacturing controlled substances, we must determine whether sufficient evidence also supported a finding that he exercised dominion and control over the premises and therefore constructively possessed the manufactured contraband and the manufacturing process. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Possession may be either actual or constructive. *Staley*, 123 Wn.2d at 798. Mere proximity cannot establish dominion and control. *State v. Hystad*, 36 Wn. App. 42,

[4] Initially, the trial court sentenced Iata to 111 months, but after the Department of Corrections noticed an error in the sentence calculation, the trial court amended the judgment and sentence to conform to the statutory guidelines.

49, 671 P.2d 793 (1983). Dominion and control need not be exclusive; the State can establish it through circumstantial evidence. *State v. Wood*, 45 Wn. App. 299, 312, 725 P.2d 435 (1986).

The police found Blakeney in a bedroom in the apartment listed on the search warrant. In this bedroom, police found documents addressed to him, including a bank statement addressed to both Iata and him. From this evidence, a jury could find that both resided in the apartment. A loaded handgun was in the bedroom closet where police found him. The kitchen was in an open area and accessible from other areas of the apartment. He also exercised dominion and control over the implements of manufacture, including cocaine-laced microwaves, bowls, measuring cups, and knives. Therefore, because constructive possession need not be exclusive, sufficient evidence supported the jury's finding that Blakeney exercised dominion and control over the apartment and the areas where police found contraband, including the cocaine, firearm, marijuana, and stolen property. His insufficiency argument fails.

Timeliness of Accomplice Liability Instruction

Blakeney next contends that the trial court erred by instructing the jury on accomplice liability after closing argument had already begun. He argues that the prosecutor committed misconduct by presenting accomplice liability without offering an instruction to the jury, that the trial court should have granted his motion for mistrial, and that these failings violated his due process rights. Iata argues that the untimely jury instruction prejudiced her.

Parties must limit their arguments before the jury, setting forth the law as stated in the trial court's instructions. *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984). The trial court may amend the instructions, even after deliberations have begun. *State v. Becklin*, 163

Wn.2d 519, 530, 182 P.3d 944 (2008). To preserve such an objection, counsel must object in time for the trial court to correct the error. *State v. Classen*, 143 Wn. App. 45, 64, 176 P.3d 582, *review denied*, 164 Wn.2d 1016 (2008).

Here, the trial court had not instructed the jury on accomplice liability before the State made an argument based on that theory. Defense counsel objected as soon as practicable by passing a note to the judge, who then dismissed the jury and acted on the objection. The trial court acted appropriately when it amended the jury instructions and read the amended portions to the jury in time for both sides to argue the matter before deliberations. *See State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). Furthermore, the trial court properly informed the jury of the applicable law and did not mislead the jury. *Redmond*, 150 Wn.2d at 493.

Therefore, because the trial court did not err with respect to the accomplice liability instructions, Blakeney's arguments regarding the timeliness of the accomplice liability instruction, prosecutorial misconduct, and due process violations fail. Iata's prejudice argument fails for the same reason.

First Amendment

Iata contends that the accomplice liability statute, RCW 9A.08.020, criminalizes speech protected under the First Amendment.[5] U.S. Const. amend. I. She argues that RCW 9A.08.020 is overbroad and facially unconstitutional because it criminalizes a substantial amount of speech and conduct the First Amendment protects.

[5] The State counters that Iata failed to preserve this error for appeal by not objecting to the instructions on the basis of the First Amendment, but we analyze errors raised for the first time on appeal if they assert, as here, a manifest error affecting a constitutional right. RAP 2.5(a).

Under RCW 9A.08.020,

> (1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.
>
> (2) A person is legally accountable for the conduct of another person when:
>
> (a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct; or
>
> (b) He is made accountable for the conduct of such other person by this title or by the law defining the crime; or
>
> (c) He is an accomplice of such other person in the commission of the crime.
>
> (3) A person is an accomplice of another person in the commission of a crime if:
>
> (a) With knowledge that it will promote or facilitate the commission of the crime, he
>
> (i) solicits, commands, encourages, or requests such other person to commit it; or
>
> (ii) aids or agrees to aid such other person in planning or committing it.

The First Amendment provides that "[c]ongress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This protection applies to the several states through the Fourteenth Amendment. *Kitsap County v. Mattress Outlet/Gould*, 153 Wn.2d 506, 511, 104 P.3d 1280 (2005); *Adams v. Hinkle*, 51 Wn.2d 763, 768, 322 P.2d 844 (1958). Under Washington's Constitution, "[e]very person may freely speak, write and publish on all subjects, being responsible for an abuse of that right." Wash. Const. art. I, § 5. Here, we review a challenge under either constitution similarly. *See City of Seattle v. Huff*, 111 Wn.2d 923, 928, 767 P.2d 572 (1989).

A statute is unconstitutionally overbroad if it prohibits a substantial amount of protected speech and conduct in addition to legitimately prohibited unprotected speech or conduct. *City of Seattle v. Webster*, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990); *Huff*, 111 Wn.2d at 925.

Iata relies on *Brandenburg v. Ohio*, and its holding that a State may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969). She argues that the court improperly instructed the jury with the accomplice liability instruction by defining the word "aid" to mean: "all assistance whether given by words, acts, encouragement, support, or presence." Clerk's Papers (CP) (Iata) at 98. She asserts that these are protected actions under the First Amendment. We disagree.

The instruction read:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP (Iata) at 98. Iata's argument overlooks the conditional language in the instruction and the statute. Under both the instruction and RCW 9A.08.020(3)(a), a person must have knowledge that his or her actions "will promote or facilitate the commission of the crime" before mention of any definition of the word "aid" or assistance. CP (Iata) at 98. Police found Iata's identification

in a blue denim purse containing a revolver, freebase cocaine, cash, and a broken scale. Police also found a bank statement addressed to her at the apartment's address.[6] The instruction accords with the Court's holding in *Brandenburg* that advocacy of criminal activity is not in itself criminal. 395 U.S. at 447.

Here, the trial court instructed the jury that to be convicted as an accomplice, a person must give aid with the knowledge that giving the aid will promote or facilitate the crime. Reading the statute and instruction in full clarifies their compliance with the Supreme Court's holding in *Brandenburg*. The accomplice liability statute does not prohibit a substantial amount of protected speech and is not overbroad. *Huff*, 111 Wn.2d at 925. Iata's argument fails.

State's Burden on Accomplice Liability Instruction

Iata next contends that the accomplice liability instruction relieved the State of its burden to prove an overt act. She relies on *State v. Matthews*, 28 Wn. App. 198, 203, 624 P.2d 720 (1981), to assert that accomplice liability requires an overt act.

In *Matthews*, we cited *State v. Baylor*, 17 Wn. App. 616, 565 P.2d 99 (1977), for the proposition that when co-defendants are charged with a crime, the State need not "establish which defendant was the principal and which was the abettor so long as each defendant was shown to have participated in the crime and committed at least one overt act." 28 Wn. App. at 203. In *Baylor*, we held that the overt act requirement applied under former RCW 9.01.030 (1974), which we acknowledged had been superseded by RCW 9A.08.020.[7] 17 Wn. App. at 618.

[6] One of the documents with Blakeney's name on it listed a different address in Tacoma.

[7] Thus, the language of the Washington pattern jury instruction 10.51 and its explanation that "mere presence" is not enough to find accomplice liability satisfies what we formerly referred to

Here, the instructions properly informed the jury that mere presence and knowledge of criminal activity alone does not satisfy the requirements of accomplice liability.[8] *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). Therefore, as discussed above, the jury instructions adequately informed the jury of the law without misleading it or preventing either side from arguing its case to the jury. *Redmond*, 150 Wn.2d at 493. Iata's argument fails.

Knowledge Instruction

Iata next contends that the knowledge instruction created a mandatory presumption, thus relieving the State of its duty to prove intent.[9] Relying on our decision in *State v. Goble*, she argues that RCW 69.50.401, manufacture of a controlled substance, implicitly includes two mental state elements. 131 Wn. App. 194, 126 P.3d 821 (2005).

In *Goble*, we held that submitting a confusing jury instruction was reversible error because it allowed the jury to conclude that a finding of an intentional act with respect to one element could satisfy a finding of knowledge with respect to a different element of the crime. 131 Wn. App. at 203-04. In *State v. Gerdts*, we distinguished *Goble* as applying to cases where more than one mental state is before the jury. *Gerdts*, 136 Wn. App. 720, 728, 150 P.3d 627 (2007). In *State v. Keend*, we further clarified that *Goble* applied to cases where the instructions could

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as an "overt act" requirement. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.51, at 217 (3d ed. 2008).

[8] But presence can be enough if by being present one stands ready to assist in the crime. *State v. Luna*, 71 Wn. App. 755, 759, 862 P.3d 620 (1993).

[9] We note that our Supreme Court has accepted review of this issue. *State v. Sibert*, noted at 135 Wn. App 1025 (2006), *review granted*, 163 Wn.2d 1059 (2008).

confuse the jury. *Keend*, 140 Wn. App. 858, 868, 166 P.3d 1268 (2007), *review denied*, 163 Wn.2d 1041 (2008).

In *State v. Sims*, our Supreme Court held,

> It is impossible for a person to intend to manufacture or deliver a controlled substance without knowing what he or she is doing. By intending to manufacture or deliver a controlled substance, one necessarily knows what controlled substance one possesses as one who acts intentionally acts knowingly. Without knowledge of the controlled substance, one could not intend to manufacture or deliver that controlled substance. Therefore, there is no need for an additional mental element of guilty knowledge.

119 Wn.2d 138, 142, 829 P.2d 1075 (1992) (citation omitted). Therefore, because the trial court's jury instructions were not confusing under *Goble*, *Gerdts*, and *Keend*, and no additional mental state instructions need be given under *Sims*, Iata's argument fails.

Statements of Additional Grounds

In his statement of additional grounds,[10] Blakeney argues that his school bus route stop and firearm enhancements were improper. He asserts that because the special needs child serviced by the bus stop was in preschool at the time of the crime, the enhancement does not apply. With respect to the firearm enhancement, he argues essentially that insufficient evidence supported a finding of constructive possession. As we already addressed the sufficiency of the evidence regarding constructive possession of the firearm, we turn to the school bus route stop enhancement.

At trial, the State called Robert Woolery, Fife School District director of transportation, who testified that there was a school bus stop 266 feet from the apartment where police served

[10] RAP 10.10(a).

the warrant. Blakeney argues that the trial court instructed the jury that a common school includes "a program from kindergarten through twelfth grade or any part thereof" and that preschool does not fall into that category. CP (Blakeney) at 75.

Blakeney's reading of the jury instructions is too narrow. The trial court also instructed the jury that any stop designated by the school district is a school bus route stop and that any program below the college level and funded at public expense counts as a common school. Because a bus stop for a special needs preschool student funded by Fife School District falls under these instructions, Blakeney's argument fails.

In her statement of additional grounds, Iata argues insufficient evidence established her constructive possession of a firearm, that insufficient evidence supported the school bus route stop enhancement, that probable cause did not support the search warrant, and that new discovery in the middle of trial violated her due process rights.

Sufficient evidence existed for the jury to find a firearm enhancement and, as discussed above, it also existed for the jury to find a school bus route stop enhancement.[11]

Iata failed to preserve her argument regarding sufficiency of the search warrant and discovery at trial. First, neither Blakeney nor Iata objected to the warrant at any time. Second, neither party objected when the court ruled that to cure any problem with discovery, all parties would be granted an additional day to prepare to examine the witness in question. Because the parties did not preserve these arguments at trial, we will not review them further on appeal. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); RAP 2.5(a); RAP 16.4.

[11] Although her contention differs slightly from Blakeney's with respect to the school bus route stop enhancement, it remains a sufficiency argument and therefore fails.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.